Supreme Court, U.S.
FILED
OCT 12 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-482

In The

Supreme Court of the United States

October Term, 1985

THE FIRESTONE TIRE AND RUBBER COMPANY,
Petitioner,

vs.

THELMA COUSINEAU, Personal Representative
of the Estate of MARK COUSINEAU,
Respondent.

BRIEF IN RESPONSE TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

MAY A STATE CONSTITUTIONALLY IMPOSE TORT LIABILITY ON MEMBERS OF AN INDUSTRY FOR THEIR JOINT ACTIVITY IN PETITIONING AN AGENCY OF THE UNITED STATES GOVERNMENT FOR ADOPTION OF A SAFETY STANDARD?

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STATEMENT OF THE CASE

Respondent Goodyear Tire and Rubber Company endorses, and adopts herein by reference, the statement of the case contained in Petitioner's Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

The right of an individual, association of individuals, or corporation to petition the government for legislative or administrative action is a preeminent first amendment privilege. The decision of the Court of Appeals impermissibly held that the joint action of several multi-piece wheel manufacturers in petitioning OSHA for regulations governing safety practices in the servicing of such wheels could form the basis for an action in tort.

ARGUMENT

The Michigan Court of Appeals found that the petitioning activity of certain wheel-makers, defendants in the case below, could supply the foundation for liability on a concert of action tort claim. Petitioner Firestone Tire and Rubber Company has filed a Petition for Writ of Certiorari, arguing that these petitioning activities were constitutionally protected and therefore could not be the subject of a tort claim. Respondent Goodyear Tire and Rubber Company whole-heartedly endorses Firestone's analysis, and wishes to add its support to Firestone's Petition for Writ of Certiorari.

In order to state a prima facie case under a concert of action theory, a plaintiff must demonstrate that the defendants were jointly engaged in tortious activity as a result of which the plaintiff was harmed. *Abel* v. *Eli Lilly & Co.*, 418 Mich 311, 338; 343 NW2d 164 (1984), citing *Walters* v. *Sargent*, 390 Mich 775; 210 NW2d 315 (1973). The concert of action doctrine was apparently developed "to deter hazardous group behavior." *Abel, supra*, fn 19. Given that rationale, it is ironic as well as unfortunate that a Michigan appellate court should apply a concert of action theory to constitutionally-protected conduct.

The first amendment right to petition was recognized as a constraint upon anti-trust actions nearly a quarter of a century ago in *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 US 127 (1961). In that case, a group of trucking companies and their trade association brought suit against a group of railroads, a railroad association and a public relations firm, alleging that the railroads had violated the Sherman Act by conducting a publicity campaign "designed to foster the adoption and retention of laws and law enforcement practices destructive of the trucking business, to create

an atmosphere of distaste for the truckers among the general public, and to impair the relationships existing between the truckers and their customers." 365 US at 129. The Supreme Court held that "the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly." 365 US at 136. To hold otherwise, the Supreme Court concluded, "would raise important constitutional questions." The Supreme Court also recognized a "sham" exception to its doctrine, noting that application of the Sherman Act would be justified where activity purportedly intended to influence governmental action was in reality nothing more than an attempt to interfere directly with business relationships of a competitor. 365 US at 144. See also *United Mine Workers of America* v. *Pennington*, 381 US 657 (1965).

In *California Motor Transport Co.* v. *Trucking Unlimited*, 404 US 508 (1972), the Supreme Court stated explicitly that the *Noerr* decision had rested on the constitutionally-guaranteed right to petition the government.

The so-called *Noerr-Pennington* doctrine has found roots outside the anti-trust context. For example, it has been held that efforts to petition the government do not give rise to liability for tortious interference with business. See, *eg*, *NAACP* v. *Claiborne Hardware Co.*, 458 US 886 (1982); *Havoco of America, Limited* v. *Hollobow*, 702 F2d 643 (CA 7, 1983). While there may be proper limits to the reach of the *Noerr-Pennington* doctrine, it would do no violence to that doctrine to apply it in the context of concert of action theory. Indeed, a tort theory intended to deter hazardous conduct should never be applied to protected activity.

Finally, respondent Cousineau could never make a case that the petitioning activity engaged in by Firestone, Goodyear, and the other wheel manufacturers comes within the "sham" exception of the *Noerr-Pennington* doctrine. The fact that an OSHA final standard on servicing multi-piece wheels was in fact promulgated should quash any such notion. See petitioner's appendix F. Note further that the wheel-maker's petitions were not the only impetus behind formulation of the standard. OSHA field personnel advocated the establishment of such a standard prior to the wheel-maker's petitioning activities. *Id.*, p 39a.

CONCLUSION

For the reasons set forth above, respondent Goodyear Tire and Rubber Company urges that the Writ of Certiorari sought by petitioner be issued.

Respectfully submitted,

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Dated: October 10, 1985